SIN MATU SYIPYARD SDN BHD A

v.

LABUAN MARITIME SERVICES SDN BHD & ORS

HIGH COURT SABAH & SARAWAK, LABUAN B
SULONG MATJERAIE J
[SUIT NO. K22-183-1997]

CIVIL PROCEDURE: *Appeal - Competency of appeal - Appeal against SAR's ruling - Whether court has jurisdiction - Whether SAR's ruling manifestly a final order - Whether a 'decision' as defined under s. 3 Courts of Judicature Act 1964* C

The plaintiff appealed against the decision of the senior assistant registrar of the High Court, who made a ruling setting aside a judgment in default which was entered against the first defendant. The first defendant/respondent raised a preliminary objection contending the appeal as incompetent and as such this court had no jurisdiction to entertain the appeal. It was his contention that the said decision by senior assistant registrar was in fact not a final order. The issue that arose was whether the ruling by the senior assistant registrar fell under the provision of s. 3 Courts of Judicature Act 1964. D E

Held (dismissing preliminary objection raised by first defendant/respondent): F

(1) The ruling by the senior assistant registrar was by way of a hearing, in exercising her discretionary power to set aside the judgment in default against the first defendant/respondent made at the end of submissions by the parties after considering the application itself, the affidavits in support, the authorities and the pleadings and all relevant materials. This 'ruling' was not made in the course of a trial or hearing of any cause or matter. Furthermore, by applying the principle of inequality as enshrined under art. 8(1) of the Federal Constitution, the plaintiff/appellant should not be denied the right to appeal. G H

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(2) The ruling of senior assistant registrar was manifestly a final order. It was therefore a decision as defined under s. 3 Courts of Judicature Act 1964. Since there has to be a decision first before the appellate civil jurisdiction of the High Court could be exercised under O. 56 r. 1, the present appeal brought by the plaintiff/appellant was therefore competent.

Case(s) referred to:

Bozson v. Altrincham Urban District Council [1903] 1 KB 547 ***(refd)***

Syarikat Tingan Lumber Sdn Bhd v. Takang Timber Sdn Bhd [2003] 2 CLJ 177 CA ***(refd)***

Delcont (M) Sdn Bhd v. Motor Sport International Ltd & Ors [1996] 1 CLJ 450 HC ***(refd)***

MBf Factors Sdn Bhd v. Keh Hua t/a Jag Trading [2004] 1 CLJ 409 HC ***(refd)***

Negara Properties Sdn Bhd v. Akitek Bersekutu Malaysia [1996] 2 CLJ 923 HC ***(refd)***

Pembenaan Keng Ting (Sabah) Sdn Bhd v. Seloga Jaya Sdn Bhd [1994] 2 CLJ 76 HC ***(refd)***

Salaman v. Warner & Ors [1891] 1 QB 734 ***(refd)***

Tuan Hj Ahmed Abdul Rahman v. Arab Malaysian Finance Bhd [1996] 1 CLJ 241 FC ***(refd)***

Legislation referred to:

Court of Judicature Act 1964, ss. 3, 4
Federal Constitution, art. 8(1)
Rules of the High Court 1980, O. 56 r. 1(2), (3), (3A), (4)

For the plaintiff - Colin Lau; M/s Colin Lau & Co
For the 1st defendant - Rakhbir Singh; M/s Rakhbir Singh & Co
For the 3rd defendant - Ting Sing Chuan

Reported by Suhainah Wahiduddin

JUDGMENT

Sulong Matjeraie J:

[1] By way of a notice of appeal to judge in chambers dated 20 April 2000 the plaintiff appeals against the decision of learned senior assistant registrar of the High Court, who made a ruling setting aside a judgment in default which was entered against the 1st defendant on 16 June 1998. The decision was handed out on 18 April 2000.

[2] On the mention date 10 February 2004, counsel for the 1st defendant/respondent, Mr. Rakhbir Singh raised a preliminary objection contending the appeal as incompetent and as such this court has no jurisdiction to entertain the appeal. It was his contention that the said decision by learned senior assistant registrar was in fact not a final order. Counsel for plaintiff/appellant Mr. Colin Lau who was caught up by surprise with the preliminary point brought in by counsel for the 1st defendant/respondent indicated to the court of his inability to reply immediately causing the matter to be adjourned to 13 April 2004 to enable counsel to study the matter.

[3] At the hearing of the matter on 13 April 2004 arguments were heard from both counsel. Upon hearing oral submissions by counsel for both parties and perusing the authorities tendered in court this court decides that the said appeal was competent and ready to proceed to hear the appeal. The reasons for the said decision is appended below.

[4] Both counsel referred this court to the case of *Syarikat Tingan Lumber Sdn. Bhd. v. Takang Timber Sdn. Bhd.* [2003] 2 CLJ 177, a decision by the Court of Appeal, *albeit* on a different approach as to its applicability to this instant case.

[5] I stressed that this court is bound to follow the said decision in this present case.

[6] The only issue before this court is whether or not the appeal is competent to be brought before the jurisdiction of this court on the ruling made by learned senior assistant registrar when she set aside the judgment in default against the 1st defendant/respondent.

[7] Essentially, appeals from any judgment, order or decision of the Registrar of the High Court (including deputy registrar, senior assistant registrar) to the High Court Judge in chambers are governed by O. 56 r. 1 of the Rules of the High Court 1980. This vested right of appeal to the judge in chambers is subject to compliance with the requirements of the procedure laid down in O. 56 r. 1(2), (3) and (3A) of the Rules of the High Court 1980. Parties shall not be denied from appealing against any judgment, order or decision of the registrar by any other ground other than those prescribed in O. 56 r. 1.

[8] Under O. 56 r. 1(4) it is provided that except so far as the court may otherwise direct, an appeal under this rule shall not operate as a stay of proceedings in which the appeal is brought. No provision is provided under O. 56 of the Rules of the High Court for setting aside the judgment, order or decision of the High Court Judge in chambers. As such the only remedy for an aggrieved party is to appeal, against any judgment, order or decision made by a High Court Judge in chambers, see the case of *Delcont (M) Sdn. Bhd. v. Motor Sport International Ltd & Ors* [1996] 1 CLJ 450.

[9] For easy reference O. 56 r. 1 of the Rules of the High Court 1980 (Rules of the High Court) states:

> An Appeal shall lie to Judge in Chambers from any judgment, Order or decision of a Registrar.

[10] Section 3 of the Court of Judicature Act, as amended defines the word 'decision' as follows:

> 'decision' means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.

[11] There seems to be no definition as to the words 'judgment' or 'order' in the Courts of Judicature Act and neither of those words defined under the Rules of High Court 1980.

[12] However s. 4 of the Courts of Judicature Act rules out any conflicting definition when it states:

> 4 Provision to prevent conflict of laws.
>
> In the event of inconsistency or conflict between this Act and any other written law other than the Constitution in force at the commencement of this Act, the provisions of this Act shall prevail.

[13] On its face alone it could be said that the Courts of Judicature Act should be resorted to since the relevant definitions can be found there though only the word 'decision' was defined. As to the words of judgment, order or decision found under O. 56 r. 1 of the Rules of the High Court it can be said as what had been decided in *Syarikat Tingan Lumber*'s case *(supra)* that the

word 'decision' in s. 3 Courts of Judicature Act should equally apply to the word 'decision' in O. 56 r. 1 Rules of the High Court.

[14] Under the rule of construction and interpretation of statutes and documents, where particular words describing genus or category of person or things are followed by general words, then subject to any specific contra-indication, the general words will be confined to persons or things of the same class as the particular words.

[15] Therefore the ejusdem generic rules apply to the word 'decision' which is preceded by the words "judgment" and "order".

[16] Unfortunately no such arguments had been made by both counsel in their oral submission on said matter. They are relying solely on the said *Syarikat Tingan Lumber* case and leaving the entire issue to be decided by this court.

[17] There seems to be various authorities on appeal under O. 56 r. 1 Rules of the High Court. There are views to say that the "appeal to the judge in chambers" is not an appeal *per se* but as a re hearing, see the Federal Court case of *Tuan Haji Ahmed Abdul Rahman v. Arab Malaysian Finance Bhd* [1996] 1 CLJ 241 where Edgar Joseph Jr FLC said at p. 248:

> With respect, in appeals to a judge in chambers from the decision of a registrar of the High Court, the judge is not exercising appellate jurisdiction in the same sense as when he hears appeals from judgments, decisions or orders of the subordinate courts. Such appeals from decisions of the registrar are by way of an actual rehearing and the judge treats the matter as though it comes before him for the first time. The judge is therefore not confined to the points taken before the registrar so that the rule about new points being not generally open to an appellant to take on appeal does not apply.

[18] In hearing the appeal the judge in chambers is in no way fettered by the findings of the registrar's discretion and is free to exercise an independent discretion while giving the registrar's decision the weight it deserves. Where no reasons were given by way of a written judgment but only a bare decision or a simple *ipse dixit*, such decision deserved no weight at all. See the case of *Pembenaan Keng Ting (Sabah) Sdn. Bhd. v. Seloga Jaya Sdn. Bhd.* [1994] 2 CLJ 76, *Negara Properties Sdn Bhd v. Akitek Bersekutu Malaysia* [1996] 2 CLJ 923.

[19] It seems now to be settled law as decided in *Syarikat Tingan Lumber*'s case *(supra)* that those authorities serve as guideline to judicial approach to be followed by the courts in hearing an appeal pursuant to the said O. 56 r. 1 Rules of the High Court. As such the exercise of power by a judge in hearing the appeal under the said order would be in his appellate capacity.

[20] Coming back to the present case as to the issue as to whether the decision of learned senior assistant registrar in setting aside the judgement in default was a ruling made in the course of a trial or hearing of any cause or matter, somehow his Lordships in *Syarikat Tingan Lumber*'s case was of the view that, "What must be asked, is not only whether a ruling does not dispose the final rights of the parties but also the question whether it was a ruling made in the course of a trial or matter, regardless of the fact that it did not dispose of the rights of the parties, it may not be excluded by the exclusion clause in the definition of 'decision' in s. 3 of the Courts of Judicature Act as amended, and is therefore appealable."

[21] The question to be answered now is whether the ruling by learned senior assistant registrar falls under the provision of s. 3 Courts of Judicature Act 1964. As far as O. 56 r. 1 Rules of the High Court is concerned there must be a 'decision' made before the appellate jurisdiction would operate. The ruling by learned senior assistant registrar was by way of a hearing, in exercising her discretionary power to set aside the judgment in default against the 1st defendant/respondent made at the end of submissions by the parties after considering the application itself, the affidavits in support, the authorities, and the pleadings and all relevant materials. I view that this 'ruling' was not made in the course of a trial or hearing of any cause or matter. Furthermore by applying the principle of equality as enshrined under art. 8(1) of the Federal Constitution I am of the opinion that the plaintiff/appellant should not be denied the right to appeal.

[22] Counsel for the 1st defendant/respondent however did argue the fact that the setting aside of judgment in default would not dispose the right of the plaintiff/appellant since the matter would finally be determined in the full trial of the case. On the other hand counsel for the plaintiff/respondent argues that the decision by learned senior assistant registrar was a final order.

[23] In determining whether the order was a final order or an interlocutory order one would have to look into the two possible tests decided previously in the English Court of Appeal cases of *Salaman v. Warner & Ors* [1891] 1 QB 734, and *Bozson v. Altrincham Urban District Council* [1903] 1 KB 547. In the *Salaman v. Warner*, Fry LJ held at p. 736:

> I conceive that an order is 'final' only where it is made upon an application or other proceeding which must, whether such application or other proceeding fail or succeed, determine the action. Conversely, I think that an order is 'interlocutory' where it cannot be affirmed that in either event the action will be determined.

[24] In *Bozson*'s Case the test laid down by Lord Alverstone CJ at p. 548 was as follows:

> Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then in my opinion an interlocutory order.

Conclusion

[25] Based on the principle enunciated in *Syarikat Tingan Lumber*'s case which was followed in the case of *MBf Factors Sdn. Bhd. v. Keh Hua t/a Jag Trading* [2004] 1 CLJ 409, it is obvious that in the present case the ruling of learned senior assistant registrar is manifestly a final order. It is therefore a 'decision' as defined under s. 3 Courts of Judicature Act 1964. Since there has to be a decision first before the appellate civil jurisdiction of the High Court can be exercised under O. 56 r. 1, the present appeal brought by the plaintiff/appellant is therefore competent.

[26] In the circumstances, the preliminary objection raised by counsel for the 1st defendant/respondent is hereby dismissed with costs to be taxed.